U.S. Department of Labor

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Issue Date: 20 June 2007

Case No.: 2006-BLA-05937

In the Matter of

D. M.
Claimant

v.

MOUNTAINTOP COAL MINING, INC.
Employer

and

STATE WORKERS INSURANCE FUND (PA)
Carrier

and

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS
Party in Interest

Appearances: HELEN M. KOSCHOFF, For the Claimant; JOHN A. NOCITO, For the Director

Before: ADELE HIGGINS ODEGARD
Administrative Law Judge

DECISION AND ORDER AWARDING BENEFITS

This proceeding arises from a claim for benefits under the Black Lung Benefits Act, 30 U.S.C. §§ 901-945 ("the Act") and the regulations issued thereunder, which are found in Title 20 of the Code of Federal Regulations. Regulations referred to herein are contained in that Title.

Benefits under the Act are awarded to coal miners who are totally disabled within the meaning of the Act due to pneumoconiosis, or to the survivors of coal miners whose death was due to pneumoconiosis. Pneumoconiosis, commonly known as black lung, is a disease of the lungs resulting from coal dust inhalation.

On July 13, 2006, this case was referred to the Office of Administrative Law Judges for a formal hearing, and thereafter assigned to me (DX 27).[1] The hearing was held before me in Reading, Pennsylvania on December 18, 2006, at which time the parties had full opportunity to present evidence and argument.

The decision that follows is based upon an analysis of the record, the arguments of the parties, and the applicable law.

I. ISSUES

The following issues are presented for adjudication:[2]

(1) the length of the Claimant's coal mine employment;
(2) whether the Claimant is totally disabled; and
(3) whether the Claimant's total disability, if any, is due to pneumoconiosis.

II. PROCEDURAL BACKGROUND

The Claimant filed this claim for benefits on June 6, 2005 (DX 2). On April 21, 2006, the District Director issued a proposed Decision and Order denying benefits to the Claimant (DX 24). The Director found that the Claimant established that he had pneumoconiosis arising out of coal mine employment, but he was unable to establish that he was totally disabled, and therefore, unable to show a total disability due to pneumoconiosis. The Claimant requested a formal hearing on April 24, 2006 (DX 25).

Under cover dated November 22, 2006, the Director's counsel filed a motion for Partial Summary Decision on the responsible operator issue, in the administrative processing of this matter, Mountaintop Coal Company, had been designated as the responsible operator. The Employer did not appear at the hearing, and did not controvert its designation as Responsible Operator. Therefore, on February 27, 2007, I granted the Director's Motion for partial summary judgment.

III. FINDINGS OF FACT AND CONCLUSIONS OF LAW

A. Factual Background

The Claimant was born in March of 1946. He is married; his wife is his only dependent (DX 2). The Claimant worked in coal production for 13.96 years, and held various positions, including mine foreman, mechanic, driller, equipment operator and breaker foreman (DX 2, 3).

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[1] The following abbreviations are used in this Opinion: "DX" refers to Director's Exhibits; "CX" refers to Claimant's Exhibits; "T." refers to the transcript of the December 18, 2006 hearing.

[2] The Claimant's pneumoconiosis arising out of coal mine employment was established in the Director's proposed Decision and Order (DX 24), and is not in controversion.

B. Claimant's Testimony

The Claimant testified under oath at the hearing. Concerning his length of coal mine employment, he stated that he started working in coal mining around age 13, repairing trucks and doing maintenance. The Claimant testified that, at age 16, he started driving and hauling coal, and until graduation from high school, his summers, evenings, and Saturdays were spent "around the coal and the dirty coal trucks." The Claimant stated that, when he returned from college in 1967, he started in underground coal mining, and worked as a laborer and mine foreman. He also testified that he received his miner's certificate in 1977, and his mine foreman papers in 1981. These papers listed 13 years of work. He stated that he was self-employed from 1974 until 1988, when the mine closed. Then, he testified, he worked for another mine company from 1989 until 1995. He testified that between these two jobs, he worked for Tallman Supply company selling mine equipment, and that he was exposed to coal dust in that job, as a result of demonstrating equipment (T. at 13-14). He testified that he had "probably about 39" years of work in the coal industry, and asserted that during the entire time that he worked in the coal industry, he was "continually exposed to anthracite coal and rock dust" (T. at 17).

The Claimant affirmed that he did work in non-coal mine employment beginning in April 2005, driving a truck to haul eggs. When asked whether he is still engaged in that work, the Claimant testified that he is no longer doing that work, stating "[i]n August of this year, my sugar went out of control, and I had to go on insulin to control my sugar levels, and the Federal Motor Carrier doesn't allow me to drive on the road anymore…. [b]ecause I'm on insulin" (T. at 18).

Concerning his breathing problems, the Claimant stated that he first noticed problems in about 1998 or 1999, and as time went on, his breathing "seemed to deteriorate." He stated that he "can walk maybe 50 yards before [he has] to stop and take a breath" (T. at 19). He also stated that he sees Dr. Matthew Kraynak and Dr. Raymond Kraynak for treatment (T. at 20).

Concerning whether his breathing problems were related to his heart, the Claimant stated that he underwent a stress test, and the "doctor said [his] heart was no problem." He further testified that he does not have a history of heart problems, and that at one time, he thought he had chest pain, but the problem was "a reflux thing." Concerning the Claimant's weight, which was also listed as a potential cause of the Claimant's breathing problem by the physician who performed the OWCP evaluation, the Claimant stated "[p]robably the last two years I might have put 10 or 15 pounds on, because I'm no longer physically active. Driving truck, you just sit there." When asked whether any physician who has treated him suggested that his weight caused his breathing problems, the Claimant stated "[n]ot really. I mean, they all tell me I should lose weight" (T. at 21-23).

Upon my questioning, the Claimant testified that the Kraynaks are brothers, and they have a practice together. He also affirmed that when he was a teenager, he was driving a truck and hauling coal for his father, and his work starting in 1967 as self-employment was in the family-owned mine, where he was underground every day, and also did surface mining. He testified that all of his mining was in anthracite coal in Pennsylvania (T. at 23-25).

C. Length of Coal Mine Employment

Under the Act, the claimant bears the burden of establishing the length of his or her coal mine employment. Shelesky v. Director, OWCP, 7 B.L.R. 1-34 (1984); see also § 725.103. The Department's regulations at §725.101(a)(32)(ii) permit length of employment to be established "by any credible evidence including (but not limited to) company records, pension records, earnings statements, coworker affidavits, and sworn testimony." Section 718.301 provides that the length of a miner's coal mine work history must be computed in accordance with § 725.101(a)(32). This latter provision states that a "year" means a period of one calendar year, or partial periods totaling one year, during which the miner worked at least 125 "working days" in or around coal mines. To the extent that evidence permits, the beginning and ending dates of such employment shall be ascertained. Dates and length of employment may be established by any credible evidence. If the evidence is insufficient to establish the beginning and ending dates of the employment, or the employment lasted less than a calendar year, then the yearly income from work as a miner may be divided by the average daily earnings for that year, as reported by the Bureau of Labor Statistics.

In addition to the Claimant's testimony, there are several other pieces of evidence concerning the Claimant's employment history. On his claim form, the Claimant reported that he worked in coal mining for 39 years, and he worked in various jobs, including hauling coal, working as mine foreman, mechanic, driller, equipment operator, and breaker foreman (DX 2, 3). However, in the Proposed Decision and Order, the Director determined that the Claimant worked in covered employment for 14.96 years (DX 24). The record includes state certificates: one from 1977 that certifies the Claimant as a "Qualified Miner," and another from 1981 that qualifies the Claimant as a "Mine Foreman," with "13 years as a miner & man of general work." The record also includes copies of the Claimant's tax returns and tax filings for several years, which generally show the Claimant's part-ownership status of coal mines, as well as W-2 forms for the years 1970-1974, 1988-1989, and 1993-2004. The Claimant's Social Security records are not included in the record.

I find that being certified to perform a certain job, namely coal mining, does not establish actual performance of that job. In addition, ownership of a coal mining company does not establish status as a "miner," as defined at §725.202(a). Therefore, I am left with the Claimant's W-2 forms, and his descriptions of his work, which are listed on his claim form, and which were covered during his testimony. The W-2 forms are available for 19 years; however, not all of this work constitutes coal mine work. For example, the Claimant described his work for Tallman Supply Company as being a salesman of "coal mining equipment/explosives." Further, the years listed do not uniformly constitute full years of employment.

As did the District Director, I examined the Claimant's W-2 forms and CM-911a employment history form, and compared them to the Bureau of Labor Statistics table (DX 23). I determined that the Claimant's work constituted coal mine employment, if both 1) the Claimant described his occupation as coal mine employment on the CM-911a form, and 2) this work also appeared on the W-2 forms. My findings are listed below.

James B Mace
Truck Driver and Miner/laborer

1970 -- 1.0 year
$ 9,453.00

1971 – 1.0 year
$ 13,360.00

1972 – 1.0 year
$ 9,069.00

1973 – 1.0 year
$ 9,600.00

1974 – 0.19 year
$1,160.00

Keystone Coal
Equipment Operator/Mechanic/Driller

1994 – 1.0 year
$ 22,200.00

1995 – 0.44 year
$ 8,160.00

Sherman Coal Company
Breaker Foreman/Equipment Operator

1996 – 0.33 year
$ 6,116,25

1997 – 1.0 year
$ 27,810.00

1998 – 1.0 year
$ 29,820.00

1999 – 1.0 year
$ 30,335.50

2000 – 1.0 year
$ 29,575.00

2001 – 1.0 year

$ 20,995.00

Mountaintop Coal Mining
Mine Foreman/Equipment Operator

2001 – The 1.0 year maximum credit is already reached for the year 2001 through the Claimant's work for Sherman Coal Company, listed above.
$ 10,497.50

2002 – 1.0 year
$ 32,727.50

2003 – 1.0 year
$ 32,110.00

2004 – 1.0 year
$ 32,110.00

After examining the evidence of record, I find that the Claimant did not meet his burden regarding the total of 39 years that he alleged. Also, unlike the District Director who found 14.96 years of coal mine employment, I find that the Claimant has established 13.96 years.[3] Therefore, I credit the Claimant with 13.96 years of coal mine employment.

D. Relevant Medical Evidence

The Claimant presented several pieces of evidence in support of his claim, including two pulmonary function studies (CX 1, 2); two medical reports from Dr. Raymond Kraynak (CX 3) and Dr. Matthew Kraynak (CX 5), as well as their respective curriculum vitae (CX 4, 6); a transcript of a deposition of Dr. Raymond Kraynak (CX 7); the office notes of Dr. Raymond Kraynak (CX 8); and the results of a thallium stress test (CX 9).

The OWCP evaluation was performed by Dr. Joseph Mariglio (DX 11).[4]

These items will be discussed in greater detail below.

[3] I suspect a computational or typographical error in the District Director's finding.

[4] I note that on a form dated June 15, 2005, the Claimant stated that he selected Dr. Paul Stellmach to perform his pulmonary evaluation; however, his evaluation was instead performed by Dr. Mariglio. Based on the fact that the Claimant did not object to his evaluation being performed by a physician other than the one named on the OWCP form, I find that his pulmonary evaluation was in compliance with § 725.406.

D. Entitlement

Because this claim was filed after January 19, 2001, the Claimant's entitlement to benefits is evaluated under the revised regulations set forth at 20 C.F.R. Part 718. The Act provides for benefits for miners who are totally disabled due to pneumoconiosis. § 718.204(a). In order to establish an entitlement to benefits under Part 718, the Claimant bears the burden to establish the following elements by a preponderance of the evidence: (1) the miner suffers from pneumoconiosis; (2) the pneumoconiosis arose out of coal mine employment; (3) the miner is totally disabled; and (4) the miner's total disability is caused by pneumoconiosis. Director, OWCP v. Greenwich Collieries, 512 U.S. 267 (1994). The Director did not contest the first two elements; therefore, the issues remaining concern whether the Claimant has a total disability, due to pneumoconiosis.

a. Whether the Claimant has Pneumoconiosis

There are four means of establishing the existence of pneumoconiosis, set forth at §§ 718.202(a)(1) through (a)(4):

(1) X-ray evidence: § 718.202(a)(1).
(2) Biopsy or autopsy evidence: § 718.202(a)(2).
(3) Regulatory presumptions: § 718.202(a)(3).[5]
(4) Physician opinion based upon objective medical evidence: § 718.202(a)(4).

As noted above, the District Director determined that the Claimant had established that he had pneumoconiosis. No party is controverting the District Director's determination, which is supported by the record.

Pursuant to the District Director's determination, which is based on the evidence of record, I find that the Claimant has established, by a preponderance of evidence, that he has pneumoconiosis.

b. Whether the Pneumoconiosis "Arose out of" Coal Mine Employment

Under the governing regulation, a miner who was employed for at least ten years in coal mine employment is entitled to a rebuttable presumption that pneumoconiosis arose out of coal mine employment. § 718.203(b). In this case, the evidence establishes that the Claimant had 13.96 years of coal mine employment. Therefore, he is entitled to the rebuttable presumption.

[5] These are as follows: (a) an irrebutable presumption of total disability due to pneumoconiosis if there is evidence of complicated pneumoconiosis (§ 718.304); (b) where the claim was filed before January 1, 1982, there is a rebuttable presumption of total disability due to pneumoconiosis if the miner has proven fifteen (15) years of coal mine employment and there is other evidence demonstrating the existence of totally disabling respiratory or pulmonary impairment (§ 718.305); or (c) a rebuttable presumption of entitlement applicable to cases where the miner died on or before March 1, 1978 and was employed in one or more coal mines prior to June 30, 1971 (§ 718.306).

I find, therefore, that the Claimant has established, by a preponderance of evidence, that his pneumoconiosis arose from his coal mine employment.

c. Whether the Claimant is Totally Disabled

The Claimant bears the burden to establish that he is totally disabled due to a respiratory or pulmonary condition. Section 718.204(b)(1) states that a miner shall be considered totally disabled "if the miner has a pulmonary or respiratory impairment which, standing alone, prevents or prevented the miner: (i) from performing his or her usual coal mine work; or (ii) from engaging in gainful employment . . . requiring the skills and abilities comparable to those of any employment in a mine or mines in which he or she previously engaged with some regularity over a substantial period of time." Nonpulmonary and nonrespiratory conditions, which cause an "independent disability unrelated to the miner's pulmonary or respiratory disability" shall not be considered in determining whether a miner is totally disabled due to pneumoconiosis. § 718.204(a). See also Beatty v. Danri Corp., 16 B.L.R. 1-11 (1991).

The regulation provides that, in the absence of contrary probative evidence, the following may be used to establish a miner's total disability: pulmonary function tests with values below a specified threshold; arterial blood gas tests with results below a specified threshold; a finding of pneumoconiosis with evidence of cor pulmonale with right-sided congestive heart failure. § 718.204(b)(2)(i)(ii) and (iii). Where the above do not demonstrate total disability, or appropriate medical tests are contraindicated, total disability may nevertheless be established if a physician exercising reasoned medical judgment, based on medically acceptable clinical and laboratory diagnostic techniques, concludes that a miner's respiratory or pulmonary condition prevents or prevented the miner from engaging in his usual coal mine employment. § 718.204(b)(2)(iv).

1) Pulmonary Function Tests

A Claimant may establish total disability based upon pulmonary function tests. In order to demonstrate total respiratory disability on the basis of the pulmonary function tests, the studies must, after accounting for gender, age, and height, produce a qualifying value for the forced expiratory volume [FEV_1] test and at least one of the following: a qualifying value for the forced vital capacity [FVC] test; a qualifying value for the maximum voluntary volume [MVV] test; or a value of the FEV_1 divided by the FVC that is less than or equal to 55%. § 718.204(b)(2)(i). "Qualifying values" for the FEV_1, FVC, and the MVV tests are results measured at less than or equal to the values listed in the appropriate tables of Appendix B to Part 718.

The record contains the following pulmonary function test results:

Date of Test	Physician	Height	FEV_1	FVC	MVV	FEV_1/FVC ratio	Valid ?
07/26/2005	Santarelli[6]	73 in.	2.32/3.38*	2.86/4.12*	82/ –	81/82*	Yes
05/08/2006	R. Kraynak	73 in.	1.96	2.57	90.20[7]	76	Yes
08/16/2006	R. Kraynak	73 in.	1.97	2.55	57.18[8]	77.17	Yes

*The second set of numbers reflect results after bronchodilator

The Claimant was born in March of 1946, so he was 59 years old at the time that the first test was performed, and 60 years old at the time the second tests were performed. His height was listed at 73 inches for all of the tests; I find that he is 73 inches tall. For a 59 year old male, who is at least 72.8 inches tall, the qualifying FEV_1 value is 2.29, the qualifying FVC value is 2.91, and the qualifying MVV value is 92. For a 60 year old male, who is at least 72.8 inches tall, the qualifying FEV_1 value is 2.28, the qualifying FVC value is 2.90, and the qualifying MVV value is 91.

The first test did not produce qualifying results; however, the results are only slightly above qualifying. Thereafter, the second two and most recent tests administered by the Kraynaks both produced qualifying results. Therefore, two of the tests are qualifying, and the other is not qualifying, but is close. After considering the three tests together, I find that they establish that the Claimant has a totally disabling respiratory or pulmonary condition. Therefore, I find that the Claimant is able to establish total disability under this provision.

2) Arterial Blood Gas Tests

A Claimant may also establish total disability based upon arterial blood gas tests. In order to establish total disability, the test must produce a qualifying value, as set out in Appendix C to Part 718. § 718.204(b)(2)(ii). Appendix C lists values for percentage of carbon dioxide [PCO_2] and percentage of oxygen [PO_2], based upon several gradations of altitudes above sea level. At a specified gradation (e.g., 2999 feet above sea level or below), and PCO_2 level, a qualifying value must be less than or equivalent to the PO_2 listed in the table.

[6] Although the OWCP evaluation was performed by Dr. Mariglio in October 2005, his report states that he considered objective tests performed on July 26, 2005. The record contains the results of a pulmonary function test and an arterial blood gas test taken on July 26, 2005, and recorded on OWCP forms. These tests were signed by a physician named "R. Santarelli," whose credentials are not of record.

[7] The MVV results were located on different pages than the rest of the test results. This result was the highest of the Claimant's three listed trials. Therefore, while it is not indicated in the record, I presume that this MVV corresponds to the other results listed for this test.

[8] See id.

The record contains the following arterial blood gas test results:

Date of Test	Physician	PCO_2	PO_2	PCO_2 (post-exercise)	PO_2 (post-exercise)	Altitude
07/26/2005	Santarelli[9]	44.2	76.7	44.6	81.9	0 – 2999 ft

For a PCO_2 value of between 40 and 49, at an altitude of 2999 feet or less, the qualifying PO_2 value must be equal to or less than 60. Neither of the Claimant's arterial blood gas studies, either before or after exercise, yielded qualifying results. Therefore, I find that the Claimant is unable to establish total disability under this provision.

3) Cor Pulmonale

A miner may demonstrate total disability with, in addition to pneumoconiosis, medical evidence of cor pulmonale with right-sided congestive heart failure. § 718.204(b)(2)(iii). Although pneumoconiosis is already established, there is no evidence of cor pulmonale with right-sided congestive heart failure. Accordingly, I find that the Claimant has not established total disability under this provision.

4) Other Medical Evidence

Section 718.107 permits the consideration of medical evidence not otherwise covered in the regulations. However, before such evidence is considered, the party submitting the evidence has the burden to demonstrate that such evidence is "medically acceptable" and "relevant to establishing or refuting a claimant's entitlement to benefits."

In this case, the Claimant submitted two pages of handwritten notes from Dr. Kraynak, and the results of a thallium stress test, taken in June 2006.

The office notes are only minimally legible; therefore, they are of little value in making a determination in this claim, and I give them little weight. The thallium stress test is mentioned in the evidence from Dr. Matthew Kraynak and Dr. Raymond Kraynak; Dr. Matthew Kraynak stated in his November 2006 report that the Claimant "had a cardiac stress test in June of 2006, which was negative for any cardiac pathology….which was normal." In his deposition, Dr. Raymond Kraynak stated that based on the thallium stress test and his own treatment of the Claimant, he did not believe that the Claimant had any significant heart problem, and that:

> There was a question with Dr. Mariglio's report as to whether or not there was a cardiac etiology to his complaints of shortness of breath and productive cough. In regards to that, I had sent [the Claimant] for a thallium stress test, which showed no reversible ischemia or infarction, but it did show very poor exercise tolerance.

(CX 7 at 14).

[9] See supra fn. 6.

Regarding the office notes, I am not able to give them much weight because they are barely legible. Regarding the thallium test, I am unable to give it much weight because I find that the Claimant did not provide a clear basis for me to assess the value of the test regarding the issue of disability. The Claimant has the burden of demonstrating that "other medical evidence" that it provides is "medically acceptable," and in this case, I find that the Claimant did not meet that evidence. While I admit these pieces of evidence, I give them little weight.

5) Physician Opinion

Another method of determining whether the Claimant is totally disabled is through the reasoned medical judgment of a physician that the Claimant's respiratory or pulmonary condition prevents him from engaging in his usual coal mine work or comparable gainful employment. Such an opinion must be based on medically acceptable clinical and laboratory diagnostic techniques. § 718.204(b)(2)(iv). A reasoned opinion is one that contains underlying documentation adequate to support the physician's conclusions. Fields v. Island Creek Coal Co., 10 BLR 1-19, 1-22 (1987). Proper documentation exists where the physician sets forth the clinical findings, observations, facts and other data on which he bases his diagnosis. Id. An unreasoned or undocumented opinion may be given little or no weight. Clark v. Karst-Robbins Coal Co., 12 BLR 1-149, 1-155 (1989). A physician's opinion must demonstrate an adequate understanding of the exertional requirements of the Claimant's coal mine employment. Brigance v. Peabody Coal Co., B.R.B. No. 05-0722 B.L.A. (June 29, 2006)(en banc).

Dr. Joseph Mariglio (DX 11)

Dr. Mariglio evaluated the Claimant on behalf of the OWCP in October 2005. As part of the examination, Dr. Mariglio considered a chest X-ray, pulmonary function study and arterial blood gas study, which were taken in July 2005. Dr. Mariglio is Board-certified in internal medicine, with a Board-certified subspecialty in pulmonary medicine.

Dr. Mariglio recorded that the Claimant had a history of "intermittent" wheezing attacks, arthritis in his back and knees, diabetes mellitus, and high blood pressure; in addition, the Claimant reported dyspnea after a half-block, and "chest pain with exertion." Upon physical examination of the Claimant, particularly of the thorax and lungs, Dr. Mariglio saw upon inspection that the Claimant was obese, and that palpitation, percussion and auscultation were all normal.

Concerning the Claimant's cardiopulmonary condition, Dr. Mariglio made the following diagnoses: "dyspnea [secondary] to ischemic coronary artery disease (multiple risk factors, chest pain with exertion, abn EKG)." The etiology of this diagnosis was listed as CAD, with "no evidence of coal workers (sic) pneumoconiosis." Concerning impairment, Dr. Mariglio wrote that "[the Claimant] is presently working but symptoms + tests raise concern of CAD/ischemic." The cardiopulmonary condition was listed as the "main cause." Dr. Mariglio also wrote that the Claimant "needs cardiac evaluation," and "restrictive defect on PFT; most likely [secondary] to body habitus/obesity."

Dr. Matthew Kraynak (CX 5, 6)

On behalf of the Claimant, Dr. Matthew Kraynak wrote a report concerning his treatment of the Claimant, and his opinion on the Claimant's condition; the report is dated November 2006. Dr. Matthew Kraynak is Board-certified in family medicine.

Dr. Kraynak related that he has been treating the Claimant since 1997, and that the Claimant has "long-standing shortness of breath and progressive dyspnea, especially with exertion or when walking up inclines. He suffers with frequent upper respiratory infections. His condition causes him severe limitations in his activities of daily living." Dr. Kraynak also related that the Claimant "has a history of chronic arthritis in his low back, diabetes mellitus, hypertension, hyperlipidemia and gastroesophageal reflux disease." He also related that the Claimant "has established nearly fifteen years of work in the coal mine industry."[10]

Upon examination, particularly of the lungs, Dr. Kraynak found that the Claimant's "lungs reveal decreased breath sounds throughout all lung fields. He has scattered rhonchi, which clears somewhat with coughing. He has a mild increase in the AP chest diameter."

Finally, Dr. Kraynak related his general impression as follows:

> Coal Workers' Pneumoconiosis, progressively worsened over the last several years, significantly impacting his activities of daily living and his ability to work. His symptoms are directly related to his employment in the anthracite coal industry. He would be unable to perform any type of work in the coal mining industry. He would be limited with regard to his physical status and he would be unable to carry on any type of heavy labor without becoming extremely fatigued. He should not be exposed to any additional coal dust or dirt, as it would likely aggravate his existing respiratory condition. He will not improve and will likely deteriorate.

Dr. Raymond Kraynak (CX 3, 4, 7)

Dr. Raymond Kraynak also wrote a report in support of the Claimant's claim, which was written in June 2006. Dr. Kraynak is not certified in any medical discipline. He has been treating the Claimant since 1994. Before writing his report, Dr. Kraynak reviewed several medical records, including Dr. Mariglio's October 2005 report; the July 2005 chest X-ray, pulmonary function studies and blood gas studies; and a cardiac stress test from June 2006.

Dr. Kraynak's report states that the Claimant has had "complaints of exertional dyspnea, productive cough and shortness of breath, secondary to pneumoconiosis…. [with] a productive cough more so in the morning, yielding approximately one to two teaspoonsful of white to yellow sputum. He has a chronic cough throughout the day. He gets shortness of breath with

[10] Dr. Kraynak based his opinion on a coal mine employment history of "nearly fifteen years," instead of the 13.96 year history that I found. I find that this discrepancy is not great enough to affect the weight of his opinion, and that the histories are sufficiently similar so as to render any difference insignificant.

minimal exertion." He noted that the Claimant "denies tobacco use" and "has established 14.96 years of coal mine employment."

Upon examination, particularly of the lungs, Dr. Kraynak found "[m]ild increase in the AP diameters; scattered wheezes in all lung fields."

Dr. Kraynak summarized his impressions as follows:

> In my opinion [the Claimant] is disabled due to his Coal Workers' Pneumoconiosis, contracted during his employment in the anthracite coal industry. Given the 14.96 [years] of exposure to coal dust, he would be unable to return to his last work in the anthracite coal industry or perform similarly physically arduous work.

In addition, Dr. Kraynak testified by deposition, where he was examined by Claimant's counsel and Employer's counsel.[11] After discussing his qualifications, the deposition centered on his experience with the Claimant. Dr. Kraynak testified that the Claimant has been under his care since 1991, and that he has treated the Claimant for a variety of problems. Concerning the Claimant's pulmonary system, Dr. Kraynak testified that the Claimant "complains of shortness of breath, productive cough, difficulty of walking a distance of approximately a block or up a flight of steps without stopping to regain his breath." Further, he stated that his testimony would be based on a coal mine employment of 14.96 years.[12] Dr. Kraynak also testified that the Claimant had "the usual childhood illnesses," and "has a history of low back pain, diabetes, hypertension, elevated cholesterol, and esophageal reflux." In addition, he affirmed that the Claimant has never smoked. Dr. Kraynak also stated that he reviewed pulmonary function tests, which he administered, and he interpreted as showing a "severe restrictive defect."

Dr. Kraynak also discussed his brother, Dr. Matthew Kraynak's examination of the Claimant and Dr. Mariglio's report, as well as other arterial blood gas studies, and chest X-ray evidence (CX 7 at 7-13). Concerning his opinion of the Claimant's respiratory condition, he stated that the Claimant "suffers from coal worker's (sic) pneumoconiosis contracted during his employment in the anthracite coal industry…. [and] would not be able to return to his last coal mine employment. He was able to do some sedentary work driving a truck and that has stopped due to some other health problems." Dr. Kraynak also testified that his treatment of the Claimant, including stress test results, did not demonstrate a significant heart problem, and that his physical examinations did not reveal any cardiovascular abnormalities.

Concerning whether the Claimant's weight had an impact on his pulmonary condition, he stated "he is a large man. He is also a big boned man, but he is definitely heavier, significantly heavier than he should be. But he was able to work up until, you know, a short time ago in the

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[11] Although Employer's counsel did not appear at the hearing, he did appear at Dr. Kraynak's deposition, and cross-examined him.

[12] Dr. Kraynak based his opinion on a coal mine employment history of 14.96 years, instead of the 13.96 year history that I found. I find that this discrepancy is not great enough to affect the weight of his opinion, and that the histories are sufficiently similar so as to render any difference insignificant.

anthracite coal fields doing fairly arduous work running loaders, doing manual work. So … his weight wasn't the limiting factor. It was the fact that his breathing and shortness of breath have caught up with him," the etiology of his shortness of breath being "his coal worker's (sic) pneumoconiosis." (CX 7 at 13-15).

Upon cross-examination, Dr. Kraynak testified further concerning his treatment, and his brother Dr. Matthew Kraynak's treatment, of the Claimant. He also testified concerning the Claimant's weight, stating:

> [O]bviously, being overweight would diminish your pulmonary and exercise capacity to some degree, but that's a general statement. In this particular instance we have a gentleman who has been around 300 pounds for most of his adult life and up until a short time ago was, you know, doing work as a mine equipment operator and mine foreman up until '05. So really it's not – the weight really wasn't a limiting factor in this gentleman. It was other things and in particular his coal worker's (sic) pneumoconiosis.

(T. at 15-22).

Discussion

In summary, the record includes three physician opinions: two from treating physicians, Drs. Kraynak and Kraynak; and one from Dr. Mariglio, who performed the OWCP evaluation. The Claimant's two treating physicians opined that the Claimant is totally disabled due to pneumoconiosis, while the OWCP physician was not clear on whether the Claimant is disabled.

The Claimant's two treating physicians, Dr. Matthew Kraynak and Dr. Raymond Kraynak, both opined that the Claimant has a totally disabling respiratory or pulmonary condition, and that this impairment is due to pneumoconiosis. Their opinions were based on their extensive treating history with the Claimant, and also based on several objective tests. Further, they considered the Claimant's weight and possible cardiac problems, and opined that despite these other potential causes of disability, pneumoconiosis still played a contributing role. Given their treatment relationship with the Claimant, as well as the fact that their opinions were the more recent opinions in the record, and that they considered other causes of disability (particularly the Claimant's weight) I find their opinions well reasoned and well documented, and give them significant weight. See §718.104(d).

In contrast, while Dr. Mariglio opined that the Claimant had dyspnea, chest pain, and an abnormal EKG, he attributed these diagnoses to a cardiac condition, and saw no evidence of pneumoconiosis. Concerning impairment, Dr. Mariglio noted that the Claimant was working at that time, but that he saw symptoms and tests that raised concern. Therefore, it appears that because the Claimant was still working when Dr. Mariglio evaluated him, Dr. Mariglio inferred that the Claimant could not be totally disabled.

However, since the time of the evaluation, the Claimant has stopped working. In addition, although Dr. Mariglio considered the X-ray evidence positive for pneumoconiosis, he did not discuss the possible role of pneumoconiosis. Therefore, I give his opinion less weight.

Further, as a pulmonologist, Dr. Mariglio is the most qualified physician of record, and I would generally give more weight to his opinion on that basis. However, the underlying reasons for Dr. Mariglio's opinion on disability are vague and equivocal, and are contradicted by the opinions of the Claimant's treating physicians. Therefore, I can give little weight to his opinion.

After considering the physician opinions, one opinion being that the Claimant's restrictive defect seen on his pulmonary function tests was due to his obesity, the other opinion, from a treating physician, being that the obesity was not the cause, based on his experience with the Claimant, I find that the Claimant has established that he has a respiratory or pulmonary impairment based on physician opinion.

Therefore, based on the foregoing, I find that the Claimant has established by a preponderance of the evidence, that he is totally disabled due to a respiratory or pulmonary condition.

d. Whether the Claimant's Disability is Due to Pneumoconiosis

Lastly, the Claimant must establish that he is totally disabled due to pneumoconiosis. This element is fulfilled if pneumoconiosis, as defined in § 718.201, is a substantially contributing cause of the miner's totally disabling respiratory or pulmonary impairment. § 718.204(c); Bonessa v. U.S. Steel Corp., 884 F.2d 726 (3d Cir. 1989); Lollar v. Alabama By-Products Corp., 893 F.2d 1258 (11th Cir. 1990). The regulations provide that pneumoconiosis is a "substantially contributing cause" of the miner's disability if it (i) Has a material adverse effect on the miner's respiratory or pulmonary condition; or (ii) Materially worsens a totally disabling respiratory or pulmonary impairment which is caused by a disease or exposure unrelated to coal mine employment. In general, the fact that an individual suffers or suffered from a totally disabling respiratory or pulmonary impairment is not, in itself, sufficient to establish that the impairment is or was due to pneumoconiosis. § 718.204(c)(2). A Claimant can establish this element through a physician's documented and reasoned medical report. §718.204(c).

As discussed above, I found that the Claimant's treating physician opinions were well reasoned and well documented regarding the existence of a totally disabling pulmonary condition. I also credit these opinions on the etiology of this impairment, specifically, that it was due to pneumoconiosis. I find that the Kraynaks considered whether the Claimant's weight or heart conditions played a role in the Claimant's condition. They stated that they considered these possibilities in their opinions regarding the etiology of the Claimant's impairment, and I defer to their assessment.

IV. CONCLUSION

Based upon applicable law and my review of all of the evidence, I find that the Claimant has established his entitlement to benefits under the Act.

V. ATTORNEY'S FEE

No award of attorney's fees for services provided to the Claimant is made herein because no fee application has been received. Within 30 days, Claimant's counsel shall submit a fee application, in conformance with §§ 725.365 and 725.366 of the regulations. The application must be served on all parties, and a service sheet documenting such service must accompany the application. Parties have ten (10) days following the receipt of any application within which to file any objection. The Act prohibits the charging of a fee in the absence of an approved application.

VI. ORDER

The Claimant's Claim for benefits under the Act is AWARDED.

A

Adele H. Odegard
Administrative Law Judge

Cherry Hill, New Jersey

NOTICE OF APPEAL RIGHTS: If you are dissatisfied with the administrative law judge's decision, you may file an appeal with the Benefits Review Board ("Board"). To be timely, your appeal must be filed with the Board within thirty (30) days from the date on which the administrative law judge's decision is filed with the district director's office. *See* 20 C.F.R. §§ 725.458 and 725.459. The address of the Board is: Benefits Review Board, U.S. Department of Labor, P.O. Box 37601, Washington, DC 20013-7601. Your appeal is considered filed on the date it is received in the Office of the Clerk of the Board, unless the appeal is sent by mail and the Board determines that the U.S. Postal Service postmark, or other reliable evidence establishing the mailing date, may be used. *See* 20 C.F.R. § 802.207. Once an appeal is filed, all inquiries and correspondence should be directed to the Board.

After receipt of an appeal, the Board will issue a notice to all parties acknowledging receipt of the appeal and advising them as to any further action needed.

At the time you file an appeal with the Board, you must also send a copy of the appeal letter to Allen Feldman, Associate Solicitor, Black Lung and Longshore Legal Services, U.S. Department of Labor, 200 Constitution Ave., NW, Room N-2117, Washington, DC 20210. *See* 20 C.F.R. § 725.481.

If an appeal is not timely filed with the Board, the administrative law judge's decision becomes the final order of the Secretary of Labor pursuant to 20 C.F.R. § 725.479(a).